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Supreme Court, U.S.
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No. 07-

In The

Supreme Court Of the United States

JUDITH KARPOVA,

Petitioner

v.

JOHN SNOW,
Secretary,
Department of the Treasury,
United States Of America,

Respondent(s)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Dated: 1/22/08

QUESTIONS PRESENTED

1. WHETHER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT REQUIRES GOVERNMENT TO PROVIDE A DUE PROCESS HEARING, WHERE DOING SO IS FEASIBLE, BEFORE DEPRIVNG A UNITED STATES CITIZEN OF PROPERTY?

2. WHETHER THE ABSENCE OF ANY EVIDENCE OF RECORD DEMONSTRATING TRANSGRESSIONS OF THE IRAQI SANCTIONS LEGISLATION MADE ANY FINDING AS TO PETITION'S CULPABILITY AND ANY SANCTION ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW?

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OPINIONS BELOW

The district Court's opinion upholding the sanctions imposed on is reported at 402 F.Supp.2d 459 (S.D.N.Y. 2005). It appears in the Appendix at A1-33.

The Court of Appeals' decision affirming the district court's opinion is reported at 497 F.3d 262 (2d Cir. 2007) and appears in the Appendix at A-34-53. Its mandate issued on October 23, 2007.

JURISDICTION

This Honorable Court's jurisdiction is invoked pursuant to 28 U.S.C. sec.1254(1) since the order of the United States Court of Appeals for the Second Circuit was entered as a mandated on October 23, 2007 and is final.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution disallows the United States from depriving a person of property without due process of law.

STATEMENT OF THE CASE

PRIOR PROCEEDINGS

By Complaint filed on June 22, 2005, petitioner challenged the application of certain economic sanctions to her and the government's imposition of penalties without due process of law. Petitioner challenged both the arbitrary nature of the

sanctions, as well as their legality and constitutionality.

Relying on the administrative record, the United States moved to dismiss the Complaint and defended the appropriateness of the economic sanctions and their applicability to Petitioner. The government submitted that the sanctions properly applied to petitioner's conduct and met constitutional standards in all regards.

By decision dated October 28, 2005, the district court granted this motion to dismiss the first cause of action and for summary judgment on the succeeding causes of action. [A1-33].

Petitioner timely appealed and the Court of Appeals for the Second Circuit affirmed the district court's decision in an opinion dated August 14, 2007. [A34-53]. Petitioner's motion for re-hearing or re-hearing en banc was denied and the Court of Appeal's mandate issued on October 23, 2007.

STATEMENT OF FACTS

Petitioner Judith Karpova is resident of the State of New York and an American citizen. The United States of America is represented for purposes of this suit by the Executive Branch, which implements and enforces laws and constitutional provisions for the benefit of its citizens and residents.

Iraq Sanctions Regulations were enacted in 1990 to punish Iraq for its incursion into Kuwait. Pursuant to 50 U.S.C. sec. 1701, **et. seq.**, the

President of the United States has the authority "to deal with any unusual and extraordinary [foreign] threat to the national security, foreign policy or economy of the United States." Id.

In February 2003, petitioner, an ordained minister, visited Iraq as a member of the community of faith, as a writer and as a "human shield," to protest the threatened use of deadly and massive force by the United States Government. Popularly known as "human shields," the "Truth Justice Peace Action Project to Iraq [hereinafter "the project"], in which petitioner participated, was an instance of the peace brigade, interposition and accompaniment movement which commenced before Gandhi and after which he modeled his conduct. The purpose of the project was to defend Iraqi civilian infrastructure from bombing which, during the Gulf War, destroyed numerous facilities needed to sustain human life in violation of Articles 35 and 54 of the First Additional Protocol of 1977 to the Geneva Conventions.

Petitioner was also impelled to visit Iraq as a journalist who intended to report her findings to the American people. A New Jersey daily printed four of her stories from Iraq.

Petitioner left Iraq on March 9, 2003, before the commencement of military activities by the United States. Before then, while in Iraq and associated with the project, petitioner stayed at an infrastructure site verified as humanitarian by the United Nations Development Program.

Petitioner denies providing any financial benefit of any kind to the Government in Iraq when she served as a human shield and claims her actions did not violate IIEPA, 50 U.S.C. secs. 1701-06. She did not pay the former Government of Iraq during her visit to that country or, otherwise, expend any funds during her stay there.

By letter dated June 23, 2004, acting through his agents, as Secretary of the Treasury, now issued a pre-penalty notice [PPN] to petitioner charging her with "engaging in certain prohibited transactions relating to Iraq." This notice accused Karpova of "attempting to collect funds for [her] travel expenses to/from/within Iraq." The letter did not indicate whether petitioner had succeeded in collecting such funds. The PPN also asserted that petitioner "provided services to the former Government of Iraq by shielding a [government] infrastructure from possible United States military action."

In August, 2004, petitioner's counsel responded to the PPN, arguing that the sanction against her was illegal and baseless.

On March 14, 2005, appellees fined petitioner $6,700 with interest and administrative charges for her alleged violation of 50 U.S.S sec. 1701, **et. seq.** and 31 C.F.R. Secs. 757.205 and 575.207.

In June 2005, petitioner filed the instant Complaint, alleging that by punishing her travel to Iraq, appellees violated the First and Fifth Amendments the United States Constitution which

protect her right to due process of law, freedom of travel and of speech.

By imposing penalties upon petitioner though she did no violated any provision of law and based upon findings of fact which are arbitrary, capricious, inaccurate and have never been subjected to cross-examination, appellees violated 5 U.S.C. sec. 701, **et. seq.** and engaged in final agency action which was unlawful.

In rejecting petitioner's claims, the district court ruled that

1) The United Nations Participation Act ["UNPA"], 22 U.S.C. sec. 287c(a) grants the President authority to curtail economic relations and other forms of communication between American citizens and any foreign country. Likewise, the International Emergency Economic Powers Act ["IEEPA"] authorized the President to declare a national emergency with respect to "any unusual and extraordinary threat" and thereafter exercise "economic powers".

2) In 1990, Congress passed The Iraqi Sanctions Act which expressed support for "the imposition and enforcement of multilateral sanctions against Iraq" and, in the context of that nation's invasion of Kuwait, directed the President to continue a trade embargo and other economic sanctions with respect to Iraq and Kuwait. Thereafter, President George H. W. Bush issued an Executive Order invoking IEEPA and imposing economic sanctions upon Iraq.

In early 1991, the Office of Foreign Assets Control ["OFAC"] promulgated regulations implementing the 1990 economic sanctions. Those regulations set forth the procedures challenged in this case: the sanctions target is entitled to receive written notice of OFAC's intent to impose a fine for the violation of the Iraqi Sanctions Regulations and permitted to respond in writing. OFAC's director then imposes the final sanction without any allowance for an oral hearing.

3) Petitioner traveled to Iraq as a human shield and did not expend her own funds for hotels, meals or travel into or within Iraq.

4) In the PPN, OFAC cited petitioner for three alleged violations of the sanctions: she attempted to collect funds for her travel expenses to and within Iraq, she shielded a government infra-structure from possible U.S. Military action and she purchased food in Iraq.

5) Ultimately, in March 2005, OFAC sanctioned petitioner "for exporting services to Iraq and engaging in transactions related to travel in Iraq and activities within Iraq absent prior license or other authorization."

The Court of Appeals for the Second Circuit affirmed, finding that the government had not violated petitioner's right to due process by failing to afford her an evidentiary hearing at which the government would have borne the burden of proving, through competent evidence, that she violated any provision of law and that the government's

determinations were not "arbitrary and capricious". As both these conclusions are without legal or factual support, petitioner now seeks the intervention of this Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

A. THE UNITED STATES DEPRIVED PETITIONER DUE PROCESS OF LAW BY DEPRIVING HER OF PROPERTY WITHOUT AN EVIDENTIARY HEARING WHERE, AS HERE, CONDUCTING ONE WAS ENTIRELY FEASIBLE AND NECESSARY

The decision issued by the United States Court of Appeals on August 14, 2007, is in conflict with Matthews v. Eldridge, 424 U.S. 319, 324-25 (1976) and Logan v. Zimmerman, 455 U.S. 422 (1982) in that the deprivation of a hearing and an opportunity to be heard in person before imposition of the penalty violated due process.

Only at a hearing would the agency have had to set forth its proof that petitioner engaged in transactions or provided services, allowing her to respond and allowing an impartial hearing officer to determine her guilt and liability.

As no such hearing was ever held and as the regulations do not require any such hearing, as here, sanctions may be imposed without any credible evidence and without any proof by the sanctioning

agency. Such a result turns due process on its head and should swiftly be deemed unconstitutional by this Court. The pre-penalty notice did not provide sufficient specificity as to what transactions OFAC claimed petitioner engaged in to satisfy even elemental notions of due process.

B. IMPOSITION OF SANCTIONS WAS ARTIBRARY AND CAPRICIOUS AS OFAC NEVER ESTABLISHED ANY VIOLATIONS OF THE SANCTIONS REGULATIONS

The Second Circuit decision also fails to explicitly recognize that the agency imposing sanctions, OFAC, never offered any evidence showing that Karpova engaged in a single transaction which violated the transaction ban. For this reason alone, its sanction was not sustainable under the Administrative Proceedings Act, 5 U.S.C. sec. 706(2)(A).

As the Court of Appeals noted, an agency determination must be overturned when it 'offered an explanation for its decision that runs counter to the evidence before the agency.' Motor Vehicle Mfr's Assn. of U.S., Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983).

The questions presented for review - denial of due process and arbitrary agency decision-making - are plainly linked. The failure to require the agency to provide proof of any of its charges not only deprived the petitioner of her right to meaningfully be heard; it deprived the Court of Appeals of a record which

might have supported the agency's action and left the panel to literally make up evidence and arguments, substituting for the flawed agency process.

1. While the district court found that the agency could sanction petitioner for the performance of "services" to the Iraqi government, the panel dismissed that ground for the sanction and, instead, focused on whether the three "transactions" which the agency claims Karpova engaged in served as a sufficient predicate for sanction. However, as is most plain from the panel's decision, the sanctioning agency had insufficient evidence before it from which it could conclude that Karpova did engage in any "transaction" which might justify the imposition of any sanction. And, because there was no requirement for a hearing, the agency was never required to present any proof of any violation and it failed utterly to do so. Imposition of any sanction on this basis violated petitioner's due process rights.

2. More specifically, there was no credible proof that Karpova engaged in the first two transactions the panel ultimately found bottomed the sanction imposed and the third act did not present a sanctionable event.

(A) First, that Karpova appealed to friends and supporters before she left for the Middle East is not proof that [a] she received any such monies, [b] she expended any monies so raised or [c] she expended any such monies traveling to or once in Iraq. Absent any evidence of these points, no

sanction could reasonably have been imposed on Karpova for asking friends in the United States to provide monies for her trip to Iraq. The Second Circuit's decision that because someone sought to raise funds for a purpose, it is presumed that she succeeded, and further presumed that she expended such funds in a manner contravening the transactions ban enforced here is so irrational as to require a reversal as a matter of law. The panel's conclusion that the solicitation of funds in the United States – whether successful or not – violates the regulations is itself wholly arbitrary and capricious and supported by no legal precedent..

(B) Second, that Karpova did not have any records proving that her Iraqi hosts provided her lodging and food does not satisfy the agency's burden of proving that Karpova engaged in any prohibited transaction in Iraq. Again, the Second Circuit's decision in this regard is flawed in a manner which shows how critical a pre-deprivation due process hearing would have been. The agency simply lacked evidence that, contrary to her written explanation dated April 21, 2003, petitioner spent any money in Iraq on food or travel.

The panel acknowledged the contents of this letter [A-39], but chastises petitioner for not providing "proof to support her statements despite the Agency's request that she provide a copy of any travel-related receipts or records associated with her expenditures in Iraq." In that petitioner never

acknowledged making such expenditures from her own funds, unsurprisingly, she had, and provided, no such proof. Why would she have had such proof showing expenditures she did not make?

Forcing Karpova to prove a negative reversed the burden of proof – the agency had to show that Karpova made illegal expenditures and she did not bear the contrary burden. Later, in justifying reliance on this factor, the Court of Appeals cites to a writing by petitioner which, inaccurately, predicted that "her group would start paying its way once they got organized.." [A-45]. This does not represent an admission that petitioner ever purchased food in Iraq and no such admission exists in the administrative record.

(C) The panel's further characterization of the administrative proceedings is also plainly illogical and erroneous: In August of 2004, through counsel, Karpova continued to insist that she did not engage in transactions while she was in Iraq. This directly contradicts the Court of Appeals statement that, in this submission, through counsel, "[S]he did not dispute that she had engaged in transactions related to travel in Iraq...[A-41]." The letter by Karpova's counsel explicitly incorporated by reference her prior submission of April 2003 wherein petitioner denied she engaged in any food or travel related transactions in violation of the relevant regulations.

(D) Third, that Karpova traveled to Jordan and arrived in Iraq is at once accurate, but totally

irrelevant to the question of whether she thereby engaged in an impermissible transaction. She submitted that her travel was paid for by others and the agency never demonstrated the first fact to the contrary. This is particularly true since the agency failed to explain why Karpova's work as a journalist for a New Jersey newspaper and the publication of four articles for that paper in a brief period of time fails to meet the requirement for a journalist's exception to the sanctions regulation. We note that the Second Circuit failed to explain why or how subsidized travel to Iraq, wholly paid for by the Iraqis, violated the transactions ban.

(E) In short, the panel erred in concluding that the agency "set out a satisfactory explanation including a rational connection between the facts found and the choice made..." [A-43].

On the contrary, there was no evidence presented that Karpova raised any funds from the United States which she spent in Iraq, expended any funds on food or travel while in Iraq or violated the economic activity ban when she traveled from Jordan to Iraq.

CONCLUSION

The Court of Appeals holdings are at variance with this Court's precedent which properly favors adversarial hearings as a means of reaching the truth regarding disputed issues of fact. Here, such disputes abound: Karpova never conceded that she

raised any funds in the United States to fund any expenditures she made in Iraq. She specifically has denied using any personal funds to travel or buy food in that country. Nor did her travel from Jordan to Iraq, supported by Iraqis themselves, violate the economic sanctions regulations and subject her to penalty.

For these reasons, this Court should grant Karpova's petition for a writ of certiorari and reverse the decision rendered below.

Respectfully submitted,

(Signature
Stephen Bergstein)

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APPENDIX

DISTRICT COURT ORDER AND DECISION GRANTING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ENTERED ON OCTOBER 28, 2005 A 1-33

DECISION BY US COURT OF APPEALS DATED AUGUST 14, 2007 A 34-53

NOTICE OF DECISION BY COURT OF APPEALS DENYING MOTION FOR REHEARING OR REHEARING EN BANC A-54-55

UNITED STATES DISTRICT COURT
FOR THE SOURTHERN DISTRICT OF NEW YORK

x

JUDITH KARPOVA

Plaintiff

-against-

05 Civ. 5812 (CM)

JOHN SNOW, SECRETARY, DEPARTMENT OF THE TREASURY, and UNITED STATES OF AMERICA

Defendants.

x

ORDER AND DECISION GRANTING DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGEMENT

McMahon, J.:

> One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the consequences.
>
> Martin Luther King, Jr.
> From "Letter from a Birmingham Jail,"
> April 16, 1963

The hallmark of civil disobedience is the willingness of the perpetrator to pay the price of his actions. The plaintiff in this case, Judith Karpova, broke American law by going to Iraq in violation of certain Treasury Department regulations, so she could serve as a "human shield" and protect elements of Iraqi infrastructure in the weeks preceding the American invasion of that country. For her actions, she was sanctioned, by imposition of a civil penalty authorized under these regulations.

Apparently, Ms. Karpova does not want to pay this price. Instead, she brings this action, seeking rescission of the $6,700 civil penalty imposed on her, pursuant to the Iraqi Sanctions Regulations (the "Regulations"), by the Department of Treasury's Office of Foreign Assets Control ("OFAC"). Plaintiff claims that she was in Iraq, inter alia, as a journalist, and so was exempt from the reach of the Regulations (who contain an exception for journalistic activity). She claims that the Regulations unconstitutionally restrict her First Amendment right of free speech and her Fifth Amendment right to travel, and that the penalty was imposed without affording her an adequate opportunity to be heard, in violation of her right to Due Process under the Fifth Amendment. Finally, plaintiff claims that she was penalized arbitrarily and capriciously, either because the activity for which she was cited did not violate the Regulations or because the Regulations are not authorized under the law.

Defendants John Snow and the United States of America (collectively, the "defendants") move to dismiss the Complaint for failure to state a claim or, in the alternative, for summary judgment. The motion is granted.

Statutory and Regulatory Background

As a general rule, the President enjoys broad economic powers in the realm of foreign policy. The United Nations Participation Act ("UNPA"), passed in 1945, confers upon the President the authority to "investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communications between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States." 22 U.S.C. § 287c(a). Similarly, the International Emergency Economic Powers Act ("IEEPA"), which Congress passed in 1977, authorizes the President to exercise economic powers by declaring a national emergency with respect to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States . . ." 50 U.S.C. § 1701(a).

With respect to Iraq, Congress specifically has authorized the President to implement economic sanctions as a foreign policy and national security

measure. The Iraqi Sanctions Act of 1990, passed shortly after Iraq's invasion of Kuwait on August 2, 1990, expresses support for "the imposition and enforcement of multilateral sanctions against Iraq," and directs the President to ". . . continue to impose the trade embargo and other economic sanctions with respect to Iraq and Kuwait." Pub. L. No. 101-513 § 586A(5), 104 Stat. 1979, 2047; § 586C(a), 104 Stat. 1979, 2048 (1990).

Pursuant to this statutory authority, President George H. W. Bush issued an Executive Order in which he concluded, ". . . that the policies and actions of the government of Iraq constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and . . . declare[d] a national emergency to deal with that threat." Executive Order 12,722 55 Fed. Reg. 31,803 (Aug. 2, 1990). In a subsequent Executive Order, the President (1) directed that economic sanctions be imposed on Iraq, and (2) authorized the Secretary of Treasury, in consultation with the Secretary of State, to promulgate regulations implementing prohibitions on, among other things, the exportation of services to Iraq and transactions relating to travel in Iraq or activities within Iraq. Executive Order 12,724, 55 Fed. Reg. 33,089 (Aug. 9, 1990).

On January 18, 1991, OFAC issued the Iraqi Sanctions Regulations, which implemented the prohibitions outlined in the President's Executive Orders and delineated procedures for dealing with violations. See 31 C.F.R. §§ 575.201-211, 575.702-

704. Pursuant to the Regulations, upon the Director of OFAC's reasonable belief that a violation has occurred, OFAC shall issue a Prepenalty Notice ("PPN") to the alleged offender. This notice informs the recipient that OFAC intends to impose a monetary penalty for a violation of the Iraqi Sanctions Regulations unless, within thirty days of the mailing of the notice, the recipient tenders a written response setting forth the reasons why the proposed penalty should be decreased or should not be imposed at all. See 31 C.F.R. §§ 575.702, 703. After considering any such written presentation, the Director of OFAC makes a final determination about whether a violation has occurred and, if so, what penalty shall be assessed. OFAC is required to issue a Penalty Notice setting out the basis for the decision. See 31 C.F.R. §§ 575.704.

Factual Background

The relevant facts are as follows:

In February, 2003, as a member of the Truth Justice Peace Action Project ("TJP Project"), plaintiff traveled to Iraq. The primary purpose of her trip was to serve as a so-called "human shield" in the event of a U.S. invasion of Iraq. (Complaint ("Cplt.") ¶¶ 10-11). As a human shield, plaintiff's mission was to protect the Iraqi infrastructure, by "actually going to such infrastructure sites, either to publicize the threat to them or to physically remain on such sites and protect them with [her life]." (Administrative Record ("AR) at 0035). Using a visa obtained

through the TJP Project, plaintiff arrived in Iraq on February 19, 2003. (AR at 0033, 0035).

Prior to leaving the United States, for Iraq, plaintiff solicited donations to fund her trip. (AR at 0041). However, once she arrived in Iraq, she, like many other human shields, was hosted by the Peace, Friendship and Solidarity Organization ("PFSO"), an Iraqi Non-Governmental Organization. (AR at 0037). The PFSO provided plaintiff with hotels, meals and travel into and within Iraq. (AR at 0037).

Plaintiff remained in Iraq as a human shield until March 9, 2003, when she traveled to Jordan before returning to the United States. (AR at 0033).

On March 20, 2003, OFAC sent plaintiff a Requirement to Furnish Information ("RFI"), based on OFAC's receipt of information indicating that plaintiff who had not been licensed to engage in "travel transactions" in Iraq, had traveled to Iraq in February-March 2003. (AR at 0028). In response to the RFI, plaintiff submitted a letter, dated April 21, 2003, describing her trip. (AR at 0033-0038). In the letter, plaintiff explained that she went to Iraq in three capacities: (1) as a member of the community of faith seeking to "bear witness to the effect of the sanctions" imposed on Iraq by the United States; (2) as a writer, leading to publication in *The Jersey Journal* newspaper of several of her letters home, and (3) as a human shield. (AR at 0033-36).

On June 2, 2003, plaintiff's case was referred from OFAC's Enforcement Division to its Civil

Penalties Division. (AR at 0026). On June 23, 2004 OFAC sent plaintiff a PPN, informing her that OFAC intended to impose on her a civil penalty of $10,000 for exporting services to Iraq and for engaging in unauthorized travel-related transactions in Iraq. (Cplt. ¶ 18; AR at 0023-0024). The specific violations listed in the PPN include plaintiff's "attempt[] to collect funds for [her] travel expenses to/from/within Iraq. . . shielding a [Government of Iraq] infrastructure from possible U.S. military action . . . purchase of food until [her] return to Amman, Jordan . . . " (AR at 0023). The PPN advised plaintiff that she had the right to respond in writing within thirty days. (AR at 0024). On August 5, 2004, plaintiff, through counsel, submitted a written response to the PPN. In it, she objected to the imposition of a civil penalty, claiming that she provided "no services' to any agency of the Iraqi government." (AR at 0007). She also maintained that the regulatory structure in place to effect the sanction violated her due process rights; that the Regulations exceed the authority of the Executive Branch; and that the sanctions trespassed her First and Fifth Amendment rights. (AR at 0007-0010).

On March 14, 2005, OFAC issued plaintiff a Penalty Notice, imposing a civil penalty for violation of the Regulations and underlying statutory authority. (AR at 0001-0002). Plaintiff was penalized for exporting services to Iraq and engaging in transactions related to travel in Iraq and activities within Iraq absent prior license or other

authorization, as specifically set out in the PPN. (AR at 0001-0002). The Penalty Notice stated that, because "this is your first offense on record at OFAC and you provided a written response to the [PPN]," the proposed civil penalty "in the amount of $10,000 is hereby reduced by 33% to $6,700." (AR at 0002).

On June 9, 2005, plaintiff brought this action. She challenges imposition of the civil penalty, alleging that it was imposed arbitrarily and capriciously and in violation of various of her constitutional rights. Plaintiff also alleges that the Regulations themselves are both unconstitutional and not authorized by any law. Plaintiff seeks a declaration from restricting plaintiff's right to free speech and travel.

Defendants move to dismiss the Complaint pursuant to Rule 12(b)(6) for failure to state a claim or, in the alternative, for summary judgment.

Standard of Review

Dismissal of a complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is proper where "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief." Harris v. City of New York, 186 F.3d 243m 247 (2d Cir.1999). The test is not whether the plaintiff ultimately is likely to prevail, but whether he is entitled to offer evidence to support his claims. Chance v. Armstrong, 143 F.3d 698, 701 (2d Cir.1998). The court assumes that all factual

allegations in the complaint are true, and draws all reasonable inferences in the plaintiff's favor. EEOC v. Staten Island Sav. Bank, 207 F.3d 144, 148 (2d Cir.2000). "In considering a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference." Kramer v. Time Warner, Inc. 937 F.2d 767, 773 (2d Cir. 1991).

A party is entitled to summary judgment pursuant to Rule 56 when there is no "genuine issue of material fact" and the undisputed facts warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). In addressing a motion for summary judgment, "the court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in [its] favor." Matsushita Elec. Indus. Co. Ltd. V. Zenith Radio Corp., 475 U.S. 574 (1986). Whether any disputed issue of fact exists is for the Court to determine. Balderman v. United States Veterans Admin,, 870 F.2d 57, 60 (2d Cir. 1989). The moving party has the initial burden of demonstrating the absence of a disputed issue of material face. Celotex v. Catrett, 477 U.S.317, 323 (1986). Once such a showing has been made, the non-moving party must present "specific facts showing that there is a genuine issue for trail." Fed. R. Civ. P. 56(e). The party opposing

summary judgment "may not rely on conclusory allegations or unsubstantiated speculation" and "must do more than simply show that there is some *metaphysical doubt* as to the material facts." Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998); Matsushita Elec. Indus. Co., 475 U.S. 586 (citations omitted). Moreover, not every disputed factual issue is material in light of the substantive law that governs the case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment." Anderson, 477 U.S. at 248.

Plaintiff's first cause of action properly is dismissed under 12(b)(6). As to plaintiff's second and third causes of action, summary judgment is the proper procedural vehicle. The parties have submitted the complete Administrative Record relating to OFAC's action against Ms. Karpova and, as the parties have no right to ad to the Administrative Record, see Camp v. Ptts, 411 U.S. 138, 142 (1973) (holding that, in an APA case, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"), the court has before it all of the information necessary to determine whether material disputes of fact exist.

Because defendants made this motion in the alternative, under both Rules 12(b) and 56, plaintiff has always been on notice that the Court has been asked to grant summary judgment should that be

appropriate. Thus, no issue of motion conversion and notice is presented. Gurary v. Winehouse, 190 F.3d 37, 43 (2d Cir. 1999).

Discussion

A. The Sanctions Against Plaintiff Were Not Imposed Arbitrarily or Capriciously, So Defendant's Motion for Summary Judgment Dismissing the Third Cause of Action Must Be Granted.

Plaintiff's third cause of action, brought pursuant to the Administrative Procedure Act ("APA"), alleges that the $6,700 civil penalty was imposed on her by OFAC arbitrarily and capriciously. After reviewing the Administrative Record, the court finds that OFAC's determination was neither arbitrary nor capricious – and certainly was not contrary to law. For this reason, the court declines to set aside the civil penalty and grants defendants' motion.

1. *Standard of Review*

Under the APA, a reviewing court may "hold unlawful and set aside agency action, findings and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). "Review under this provision is 'narrow,' li8mited to examining the administrative record to determine 'whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear

error of judgment.'" Natural Res. Def. Council v. Muszynski, 268 F3d 91, 97 (2d Cir. 2001) (quoting City of New York v. Shalala, 34 F.3d 1161, 1167 92d Cir. 1994)). The court does not undertake its own fact-finding. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." State of New York Dep't of Soc. Serv. V. Shalala, 21 F3d 485, 493 (2d Cir. 1994) (quoting Camp, 411 U.S. at 142). In reviewing an agency action, the "court may not substitute its judgment for that of the agency." Muszynski, 268 F.3d at 97 (quoting City of New York v. Shalala, 34 F.3d at 1167). Rather, an agency decision may be set aside only where the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.." Id.

Agency determinations in the in the area of foreign relations are owed particularly great deference. See Immigration & Naturalization Serv. V. Budo, 485 U.S. 94, 110 (1988). The United States Supreme court has already found that OFAC's regulations imposing economic sanctions against a foreign country involve "weighty concerns of foreign policy," and thus enjoy this extremely high level of deference.

Agency determinations in the area of foreign relations are owed particularly great deference. See Immigration & Naturalization Serv. V. Abudo, 485 U.S. 94, 110 (1988). The United States Supreme court has already found that OFAC's regulations imposing economic sanctions against a foreign country involve 'weighty concerns of foreign policy," and thus enjoy this extremely high level of deference. See Regan v. Wald, 468 U.S. 222, 242 (1984).

Applying this highly deferential standard, the court concludes that OFAC's civil penalty determination was neither arbitrary nor capricious.

2. *Exportation of Services to Iraq*

> Section 575.205 of the Regulations provides:
> Except as otherwise authorized, no goods, technology (including technical data or other information), or services may be exported from the United States, or if subject to U.S, jurisdiction, exported or reexported from a third county to Iraq, to any entity owned or controlled by the Government of Iraq, or to any entity operated from Iraq, except donated foodstuffs in humanitarian circumstances, and donated supplied intended strictly for medical purposes, the exportation of which has been specifically licensed pursuant to § 575.507, 575.517 or 575.518

31 C.F.R. § 575.205. The Penalty Notice finds plaintiff guilty of engaging in the exportation of

services to Iraq, in violation of this section of the Regulations and the underlying statutes and Executive Orders. (AR at 0001-0002).

Plaintiff argues that her activity as a human shield did not qualify as a "service" within the meaning of the Regulations. Because the term "service" is not defined in the Regulations, the court must defer to OFAC's interpretation of the term, "...even if the agency's reading differs from what the court believes is the best [] interpretation." See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 125 S. Ct. 2688, 2699 (2005); Chevron U.S.A., Inc v. Natural Res. Def. Council, Inc. 467 U.S. 837 (1984). The Supreme Court has held that, in construing administrative regulations, "[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." United States v. Larionoff, 431 U.S. 864, 872 (1977) (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945)). To be sustained, an agency's interpretation must merely be reasonable. "We need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Udall v. Tallman, 380 U.S. 1, 16 (1965).

Under this framework, OFAC's conclusion that plaintiff's activities in Iraq constituted "services" within the meaning of the Regulations cannot be deemed arbitrary and capricious.

The Supreme Court often has relied on dictionary definitions as a means of determining the reasonableness of an agency's interpretation of a term. In this case, Black's Law Dictionary defines "service" in part as: "[a]n intangible commodity in the form of human effort such as labor, skill, or advice. Black's Law Dictionary 1372 (7th ed. 1999). Similarly, the Merriam-Webster Online Dictionary defines "service" in part as: "contribution to the welfare of others," "a helpful act" and "useful labor that does not produce a tangible commodity." Merriam-Webster Online, http://www.webster.com/cgi-bin/dictionary?book+Dictionary&va=service&x=15&y=24.

Plaintiff admits that, as a human shield, she actually went to infrastructure sites, "either to publicize the threat to them or to physically remain on such sites and protect them with [her life]." (AR at 0035). It is not unreasonable to construe the act of protecting Iraqi infrastructure as providing Iraq with "an intangible commodity in the form of human effort," which was designed to "contribut[e] to the welfare of others." Infrastructure protection is an intangible commodity. Plaintiff exerted human effort to provide Iraq with that commodity. And she did so to contribute to the welfare of others.

The issue is not whether the court would have reached the same conclusion as the relevant administrative official. The issue is whether the

administrative official reached an unreasonable conclusion. He did not.

The court rejects as erroneous and irrelevant plaintiff's contentions that she did not provide a "service" because (1) her actions as a human shield were, in the end, not helpful, and (2) she sought to aid the Iraqi people rather than the Iraqi government. As to her first reason, nothing in the Regulations condition a violation on the success of plaintiff's endeavor; and even if plaintiff was unable to stop the bombing of the sites she "shielded," by her presence she succeeded in warning Iraqis of the threat to these sites. As to the second, the Regulations are not limited in application to the exportation of services to the Iraqi government. Export of any goods, technology or services to Iraq is prohibited. See 31 C.F.R. 575.205. By her own admission plaintiff intended to provide assistance to the people of Iraq. What she did was designed to contribute to the welfare of the Iraqi people. That is what the Regulations forbid.

OFAC's determination that plaintiff violated the Regulations by providing a service was not arbitrary and capricious.

3. *Transactions Relating to Travel in Iraq or Activities within Iraq*

Section 575.207 of the Regulations provide: Except as otherwise authorized, no U.S. person may engage in any transaction relating to travel by any U.S. citizen or permanent

resident alien to Iraq, or activities by an U.S. citizen or permanent resident alien within Iraq, after the effective date, other than transactions:

(a) Necessary to effect the departure of a U.S. citizen or permanent resident alien from Kuwait or Iraq;

(b) Relating to travel activities for conduct of the official business of the United States Government or the United Nations; or

(c) Relating to journalistic activity by persons regularly employed in such capacity by a newsgathering organization

This section prohibits the unauthorized payment by a U.S. person of his or own travel or living expenses to or within Iraq.

31 C.F.R. 575.207. Pursuant to the Penalty Notice, plaintiff was found to have engaged in transactions related to travel in Iraq and activities within Iraq absent prior license or other authorization from OFAC. (AR at 0001-0002). As set forth in the PPN, these activities included solicitation of money to fund her travels and the purchase of food in Iraq. (AR at 0023).

The Administrative Record contains statements by plaintiff that she intended to pay for her travel, at least in part, and that, before traveling to Iraq, she solicited money to help pay for her travel. In a letter from plaintiff to other anti-war activists, plaintiff asked for "small donations," which "will be

earmarked to help finance my travel expenses." (AR at 0041). Likewise, in a letter that was published in *The Jersey Journal*, plaintiff stated, "We're in different hotels, as guests for a few days or a week until we get ourselves organized. They we'll pay like everyone else." (AR at 0055). Plaintiff argues that there is no evidence in the Administrative Record that she actually obtained funds or paid for any part of her travels. Of course, if there is really "no evidence" that plaintiff engaged in sanctionable conduct, imposing a sanction would be arbitrary and capricious. But there is ample evidence that plaintiff solicited funds to pay for her trip to Iraq. Indeed, she admits as much. The court cannot say that it was unreasonable for OFAC to conclude that the solicitation of funds, regardless of the success of the solicitation, violated the Regulations. The Regulations govern plaintiff's conduct, not the conduct of others. They prohibit any "transaction" relating to travel by a U.S. citizen to or within Iraq. It is not unreasonable for the Treasury Department to interpret those Regulations as prohibiting the solicitation of funds — which constitutes a transaction[1] — for use in paying for illicit travel to

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[1] The Regulations do not define the term "transaction. However, Blacks Law Dictionary defines "transaction" as: "the act or an instance of conducting business or other dealing," "something performed or carried out; a business arrangement or exchange," "any activity involving two or more persons." Black's Law Dictionary 1372 (7th ed. 1999). The Merriam-Webster

Iraq. The undisputed evidence shows that plaintiff did precisely that. Again, whether this court would have found otherwise is of no moment.

Plaintiff also asserts that she could not be found guilty of this particular violation because, as a journalist, she was exempt from the ban on travel to Iraq. (Pl.'s Mem. of Law in Opp. to Def.'s Mot. to Dismiss ("Opp.") at 9). Section 575.207 does exempt, "Authorized travel transactions [] incident to travel for the purpose of collecting and disseminating information for a recognized newsgathering organization ..." 31 C.F.R. § 575.416(b)(3). However, this exemption does not apply to plaintiff, because she admits that she went to Iraq in capacities other than as a writer — in particular, as a human shield. (AR at 0033-0038). Even if plaintiff were a journalist - and there is some question whether she so qualifies2 - that status does not provide a blanket

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Online Dictionary defines "transaction" in part as: "a communicative action or activity involving two parties or things that reciprocally affect or influence each other." Merriam-Webster Online, http://www.webster.com/cgi-bin/dictionary?book+Dictionary&va=service&x=15&y=24. Plaintiff's solicitation of funds was certainly a "communicative action or activity" "involving two or more persons," and thus clearly qualifies as a "transaction."

[2] Section 575.416 of the Regulations defines a "journalist" as a person who "is employed in a constant or regular manner by a recognized newsgathering organization." Moreover, "Free-lance journalists should have an assignment from a recognized newsgathering organization requiring travel to Iraq, or be able to

exemption for any and all travel transactions relating to a U.S. citizen's presence in Iraq. The journalistic activity exemption expressly "do[es] not include travel transactions related to *any other activity* in Iraq." 31 C.F.R. § 575.416(b)(3). Clearly some of plaintiff's activity in Iraq was not "journalistic" in nature. Acting as a human shield is not "collecting and disseminating information for a recognized newsgathering organization." Therefore, travel transactions relating to that activity are sanctionable.

Plaintiff was not sanctioned for the publication of her letters or for any other arguably journalistic activity. The fact that plaintiff published an account of her adventure in Iraq does not insulate from

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demonstrate that publication by a recognized newsgathering organization of a work requiring such travel is likely. The latter may be demonstrated by providing a resume listing previously published free-lance works or copies of previously published works." 31 C.F.R. § 575.416(b)(1). While three of plaintiff's letters were, in fact, published in *The Jersey Journal*, plaintiff did not take the position with OFAC that she was regularly employed by any recognized newsgathering organization or that she went to Iraq on assignment at the behest of any such organization. Nor did plaintiff indicate, when she was securing her travel documents, that it was likely that a newsgathering organization would publish an account of her journey. In fact, she got her visa through an anti-war protest group. The mere fact that a local newspaper published her letters would not suffice to make plaintiff a "journalist" within the meaning of the Regulation.

punishment her clearly illegal activity – any more than a CNN reporter would be exempt for travel transaction connected with his smuggling of contraband.

4. *Underlying Authority for Regulations*

Plaintiff argues that the Regulations themselves exceed presidential authority. She is incorrect.

First, plaintiff erroneously claims that the IEEPA is "[t]he only statutory authority underlying the Regulations, and that her conduct does not fall within any of the activities Congress has authorized the President to sanction under the IEEPA. (Opp. At 8). This is simply false. As discussed above, the Regulations are supported by the IEEPA, UNPA and Iraq Sanctions Act, as well as Executive Orders 12,72 and 12,724. Moreover, the IEEPA grants the President "sweeping powers" and "broad authority," see, e.g., Paradissiotis v. Rubin, 171 F3d 983, 988 (5th Cir. 1999), which would make it, in and of itself, a lawful basis for the sort of regulations applied to plaintiff.

Second, plaintiff maintains that, "President Bush lacked a predicate for imposition and extension of the economic sanctions," because "... the Iraqi regime did not pose an urgent threat to the security of the United States." (Opp. At 11). However, "Matters relating to the conduct of foreign relations...are so exclusively entrusted to the political branches of government as to be largely

immune from judicial inquiry or interference." "Regan, 468 U.s. at 242 (quoting Harisiades v. Shaughnessy, 342 U.S 580 (1952)) (rejecting respondent's contention that restrictions on travel to Cuba were not justified because no "emergency" existed). "The APA has never been construed to grant to this or any other court the power to review the wisdom of policy decisions of the President." DKT Mem'l Fund Ltd. V. Agency for Int'l Dev., 887 F2d 275, 281 (D.C. Cir. 1989). The court declines plaintiff's invitation to insert itself into a debate foreclosed to it by the doctrine of separation of powers and long-settled precedent.

B. Because Plaintiff Was Accorded All the Process She was Due, Defendants Are Entitled to Summary Judgment Dismissing Her Fifth Amendment Lack of Due Process Claim

In her second cause of action,, plaintiff claims that OFAC's imposition of a civil penalty infringed her right to due process of law as protected by the Fifth Amendment to the United States Constitution. This claim is frivolous.

The Due Process Clause guarantees that no one shall be deprived of life, liberty or property without two things: notice and a meaningful opportunity to be heard. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). However, due process, "...unlike some legal rules, is not a technical conception with a fixed content

unrelated to time, place and circumstances." Gilbert v. Homar, 520 U.S. 924, 930 (1997) (citing Cafeteria & Res. Workers v. McElroy, 367 U.S. 886, 895 (1961)). Rather, it "...is flexible and calls for such procedural protections as the particular situation demands." Id. (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

The Regulations outline the procedures to be followed by OFAC whenever the Director reasonably believes that a violation has occurred. They require issuance of a PPN – a notice that OFAC believes a violation has occurred and a civil penalty should be imposed – and an opportunity for the recipient of the PPN to make a written presentation controverting the allegations contained in the PPN. OFAC is also required to memorialize its final determination in a Penalty Notice. See 31 C.F.R. § 575.702-704.

The PPN, which is issued before the penalty is imposed and which must "...describe the violation, specify the laws and regulations allegedly violated, and state the amount of the proposed monetary penalty," satisfies the Due Process Clause's notice requirement. The opportunity to controvert the charge in writing gives a person in plaintiff's position a meaningful opportunity to be heard. 31 C.F.R. §575.702-704. OFAC followed its procedures in this case. There is, therefore, no question that the Mullaine test has been satisfied.

The Regulations do not call for a testimonial hearing. However, they do not have to in order to satisfy due process. In the context of administrative

proceedings, the Supreme Court has held, "There is no inexorable requirement that oral testimony must be heard in every administrative proceeding in which it is tendered." Fed Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 247-48 (1988). Likewise, the Second Circuit "declin[es] to attach talismanic significance" to the availability of a testimonial oral hearing, and has held that, in the context of an administrative proceeding, written submissions constitute a meaningful opportunity to be heard. Interboro Inst. Inc., v. Foley, 985 F.2d 90, 93 (2d Cir. 1993) (citing Oberlander v. Perales, 740 F.2d 116 (2d Cir. 1984)); see also Flannelly v. Bd. Of Tr., 6 F.Supp2d 266, 268 (S.D.N.Y. 1998)

Despite this settled law, plaintiff argues that she had "no chance to challenge erroneous agency information" or "presumptions which could have been assailed and cured at a hearing," and thus was denied a meaningful opportunity to be hear. (Opp. At 18-19). But neither in her written response to the PPN nor in her Opposition to Defendant's Motion to Dismiss did plaintiff identify a single fact in the agency's possession that was wrong or any presumption that could not have been addressed in writing.

The court likewise rejects plaintiff's suggestion that she was denied due process in other respects. First, plaintiff has sought and obtained judicial review in the court of OFAC's final determination. See 5 U.S.C. § 706(2)(A). Second, "...there is a presumption of honesty and integrity in those

serving as adjudicators," and neither the Complaint nor the Administrative Record suggests in any way that the Director of OFAC had a disqualifying interest in this matter or otherwise lacked neutrality. See Withrow v. Larkin 421 U.S. 35, 47 (1975). Third, because "...we do not required an agency to provide procedures which approximate a judicial trial," plaintiff had no right to confront and cross-examine witnesses. Holy Land Found. For Relief & Dev. V. Ashcroft, 333 F3d 156, 164 (D.C. Cir. 2003) (citing Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 209 (D.C. Cir. 2001)).

The facts of this case are remarkably similar to those in Holy Land, *supra*. In that case, OFAC had designated the Holy Land Foundation for Relief and Development (HLF), the largest Muslim charitable organization in the United States, as a terrorist supporter for purposes of blocking its assets and shutting down the organization. Following notification from OFAC that it intended to reopen the administrative record and redesignate HFL, the organization was given an opportunity to respond through written submissions, which it did. However, HLF was not provided a testimonial hearing. The Holy Land court held that OFAC had provided HLF "... with the requisite notice and opportunity for response necessary to satisfy due process requirements." Holy Land, 333 F.3d at 164.

Plaintiff tries to distinguish Holy Land on the ground that, in contrast to this case, there was a need for "quick action by the government" to prevent

the use of HLF assets in international terrorism, thus justifying post-deprivation due process. However, like Ms. Karpova, HLF was afforded pre- not post-deprivation process. Moreover, any need for haste did not dictate the result in that case. Rather, the court considered the process afforded HLF and found that the notice and opportunity to be heard through written submissions satisfied the requirements of the Due Process Clause. Id at 163-64.

Here, as in Holy Land Holy Land, plaintiff was afforded adequate due process despite the lack of a testimonial hearing. Her Fifth Amendment right to due process was not violated.

C. Because the Regulations Do Not Deprive Plaintiff of Either Her First or Her Fifth Amendment Rights, Defendants Are Entitled to Dismissal or Summary Judgment On Her First Cause of Action

1. *Fifth Amendment Right to Travel*

In her first cause of action, Plaintiff alleges that the Regulations and the civil penalty imposed upon her pursuant to the Regulations violate her right to travel as guaranteed by the Fifth Amendment. The court rejects this argument as baseless and contrary to well-established law.

The Supreme Court has long recognized that, "The right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." Zemel v. Rusk 381

U.S. 1, 14 (1965) (citing Kent v. Dulles, 357 U.S. 116, 125 (1958)). However, the Court has emphasized that, for Fifth Amendment purposes,"... the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States." Haig v. Agee, 453 U.S. 280, 306 (1981) (emphasis in original). Unlike the right of interstate travel, which is "virtually unqualified," the freedom to travel internationally is far from absolute, and has been described as "no more than an aspect of liberty protected by the Due Process Clause." Id. (citing Califano v. Torres, 435 U.S. 1, 4 n.6 (1978)). The freedom to travel abroad, without more, does not overcome the presumptive constitutionality of travel restrictions based on foreign policy and/or national security justifications. See Zemel, 381 U.S. at 16; Regan, 468 U.S. at 242.

Plaintiff suggests that, "The circumstances which might trigger the kinds of travel restrictions imposed against plaintiff did not exist in 2003 or at any time thereafter," because "... the nation of Iraq posed [no] threat to the national security, foreign policy or economy of the United States." (Cplt. ¶¶ 7, 15). For the reasons discussed above, that is not an argument cognizable by this court. See discussion *supra* p. 16.

Plaintiff also argues that the Regulations were applied in a politically-motivated manner, rendering them unconstitutional. She claims that "OFAC's enforcement practices bespeak to the selective

prosecution of anti-war activists, while favorable journalists were permitted escorted access to Iraq." (Opp. At 16).

Plaintiff's selective prosecution allegation fails to state a claim because plaintiff does not allege that there were any "favorable journalists" who were similarly situated to her. In order to state a claim for selective prosecution, plaintiff is required to show both (1) that she was treated differently from other similarly situated individuals, and (2) that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. Cobb v. Pozzi, 363 F.3d 89, 110 (2d Cir. 2004) (citing Harlen Assoc. v. Inc. Vill. Of Mineola, 273 F.3d 494, 499 (2d Cir. 2001). Persons must be similarly situated "in all material respects" in order for a selective prosecution claim to be cognizable. Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 64 (2d Cir. 1997); Holmes v. Gaynor, 313 F.Supp.2d 345, 355 (S.D.N.Y. 2004) (internal citations omitted.) Plaintiff does not identify in her Complaint any pro-war journalist who provided a "service" to Iraq but was not sanctioned under the Regulations. In fact, plaintiff does not allege anything in the Complaint that could even arguably be construed as alleging that there were pro-war journalists who were similarly situated to her (i.e., who violated OFAC's Regulations) but who were not prosecuted. In her memorandum of law in opposition to defendant's

motion to dismiss, plaintiff contrasts her prosecution with the "escorted access" that was given to certain journalists – but giving someone "escorted access" is not the same thing as declining to sanction a violation of law. The analogy is inapt in the selective prosecution context.

2. *First Amendment Freedom of Speech*

In her first cause of action, plaintiff also contends that the Regulations' ban on travel to Iraq, and the penalty she faces for violating this ban, infringes upon her First Amendment right to free speech. Because neither the Regulations nor the civil penalty at issue implicates plaintiff's First Amendment rights, plaintiff fails to state a First Amendment claim.

Plaintiff was sanctioned for exporting services to Iraq and engaging in certain unlawful travel-related activities – not for publishing articles in a local newspaper or otherwise exercising her right to free speech. The terms of the PPN and the Penalty Notice make that clear. (AR at 0023; 0053-0056). So plaintiff was not punished for speaking out against the war. Moreover, the Regulations do not ban the gathering or dissemination of news pertaining to Iraq or travel transactions that are solely in connection therewith. Indeed, they were carefully crafted to exempt transactions, "Relating to journalistic activity by persons regularly employed in such capacity by a newsgathering organization." 31 C.F.R. § 575.207(c).

In Zemel, the Supreme Court held that the Secretary of State's refusal to validate plaintiff's passport for travel to Cuba did not deny plaintiff any free speech or associational rights as guaranteed by the First Amendment, because the restriction on her travel did not result from any expression or association on plaintiff's part:

> [We] cannot accept the contention of the appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry in the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

Zemel, 381 U.S. at 16-17. Here, as in Zemel, the Regulations and penalties at issue reach only plaintiff's actions – not her speech. Therefore, plaintiff has suffered no violation of her First Amendment rights.

To the extent that plaintiff's activity as a human shield is deemed expressive anti-war speech as well as a "service" in violation of the Regulations, plaintiff's case is one in which both speech and non-speech elements are present in the activity that is restricted. "A sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968).

The Supreme Court has held that incidental government regulation of speech is justified if (1) the regulation is within the constitutional power of the Government; (2) it furthers an important or substantial Government interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. At 377. Under the O'Brien standard, any incidental restriction imposed by the Regulations on plaintiff's right to engage in expressive speech is sufficiently justified.

First, the Regulations clearly fall within the constitutional power of the government, as they were implemented pursuant to the authority granted by Executive Orders 12,722 and 12,724 and the IEEPA, UNPA and the Iraqi Sanction Act. See discussion *supra* pp. 2-4; see also Miranda v. Sec'y of Treasury, 766 F.2d 1, 3 (1st Cir. 1985) ("It is a basic principle of our system of government that, when acting

pursuant to Congressional authorization in the field of foreign affairs, the President commands all the political authority of the United States.") (United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).

Second, "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Haig, 453 U.S. at 307.

Third, the governmental interest at issue – imposing economic sanctions on Iraq in an effort to alleviate the perceived threat posed by Iraq to our national security – is clearly unrelated to the suppression of free expression. As the Second Circuit ruled when upholding a requirement that addresses of publications originating in North Vietnam and China obtain licenses before receiving those publications, "[R]estricting the flow of information or ideas is not the purpose of the regulations. The restriction of first amendment freedoms is only incidental to the proper general purpose of the regulations: restricting the dollar flow to hostile nations." Teague v. Regional Comm'r of Customs, 404 F. 2d 441, 445 (2d. Cir. 1968).

Fourth, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest in national security. As noted above, the Regulations contain an explicit exception permitting journalists to engage in travel-related transactions that would otherwise be illegal. See 31 C.F.R. §§ 575.207(c).

Therefore, "Applying the Supreme Court's test here [the court] concludes that the [alleged] infringement of first amendment freedoms is permissible as incidental to the proper, important, and substantial general purpose of the regulations." Teague, *supra*., 404 F.2d at 446.

Conclusion

For the foregoing reasons, the complaint is dismissed in its entirely.

The Clerk of the Court is directed to enter judgment in favor of Defendants, and to close the file.

This constitutes the decision and order of the Court.

Dated: October 28, 2005

(signature of Colleen McMahon)
U.S.D.J

BY FAX TO ALL COUNSEL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006
(Argued September 11, 2006
Decided August 14, 2007)
Docket No. 06-0104-cv

JUDITH KARPOVA,

Plaintiff-Appellant,

—v.—

JOHN SNOW, SECRETARY,
DEPARTMENT OF THE TREASURY,
UNITED STATES OF AMERICA,

Defendants-Appellees.

Before:

CARDAMONE, SOTOMAYOR, AND KATZMANN,

Circuit Judges.

Plaintiff Judith Karpova appeals from the judgment entered October 31, 2005 in the United States District Court for the Southern District of New York (McMahon, J.) dismissing her complaint. Karpova alleged the Department of Treasury's Office of Foreign Assets Control had violated her constitutional rights and acted in an arbitrary and

capricious manner in violation of the Administrative Procedure Act when it fined her for traveling to Iraq in violation of the Iraqi Sanctions Regulations.

Affirmed.

MICHAEL H. SUSSMAN, Law Offices of Michael H. Sussman, Goshen, New York, *for Plaintiff-Appellant.*

ROSS E. MORRISON, Assistant United States Attorney, New York, New York (Michael J. Garcia, United States Attorney, Sara L. Shudofsky, Assistant United States Attorney, Southern District of New York, New York, New York, of counsel), *for Defendants-Appellees.*

CARDAMONE, *Circuit Judge:*

Plaintiff Judith Karpova (plaintiff or appellant), a resident of New York State and an American citizen, traveled to Iraq in 2003. Purporting to belong to a group known as the Truth, Justice, and Peace Human Shield Action Project (Project), whose aim was to deter the bombing of civilian infrastructure facilities by acting as human shields at such sites in that country, plaintiff claims she went to Iraq in three capacities: as an ordained minister to bear witness to the effect on Iraq's people of economic sanctions, as a professional writer and journalist sending letters or reports to the *Jersey*

Journal, a daily newspaper in Jersey City, New Jersey, and as a human shield to prevent destruction of civilian infrastructure in the event of renewed hostilities. Unfortunately, in doing this and despite her good intentions, plaintiff transgressed several executive orders and United States Treasury Department regulations that governed what interactions United States citizens could have with Iraq while economic sanctions were in place.

Because plaintiff violated those orders and regulations, the Office Of Foreign Assets Control within the United States Department of the Treasury (Foreign Assets Control Office or Agency) assessed against her a civil monetary penalty of $6,700. To set aside this fine, plaintiff brought suit against the government in the United States District Court for the Southern District of New York (McMahon, J.). In her complaint plaintiff alleged that her First and Fifth Amendment rights were violated and that the government had engaged in final agency action against her in an unlawful manner. Judge McMahon granted summary judgment in favor of the government, dismissing plaintiff's complaint in a judgment entered October 31, 2005. From that judgment Karpova appeals.

BACKGROUND

A. *Statutory and Regulatory Background*

In 1990 Congress passed the Iraqi Sanctions Act, which among other things, directed the

president to "continue to impose the trade embargo and other economic sanctions with respect to Iraq." pub. L. No. 101-513, § 586c(a), 104 stat. 1979, 2048 (1990). President bush issued executive orders premised on the notion that Iraqi government policies constituted an unusual and extraordinary threat to the national security of the United States, directing that economic sanctions be imposed on Iraq and authorizing the secretary of the treasury to promulgate regulations implementing prohibitions on, among other things, the exportation of services to Iraq and transactions related to travel to Iraq. Exec. Order no. 12,722, 55 fed. Reg. 31,803 (Aug. 2, 1990); Exec. Order No. 12,724, 55 fed. Reg. 33,089 (Aug.9, 1990). On January 18, 1991 the Foreign Assets Control Office of the United States Treasury Department issued the Iraqi Sanctions Regulations (regulations) implementing the prohibitions outlined in the president's executive orders and outlining procedures for dealing with violations. *See* 31 C.F.R. §§ 575.204-211, 575.702-704.

Under these regulations, the Foreign Assets Control Office may demand that people engaging in transactions related to Iraq provide it with complete information relative to those transactions. *See* 31 C.F.R. § 501.602. When the Agency has a reasonable belief that a violation of the regulations has occurred, it issues a Prepenalty Notice. 31 C.F.R. § 575.702. The Prepenalty Notice informs the alleged violator that a monetary penalty will be imposed unless he or she responds in writing explaining why a penalty is inappropriate. *Id.* If the recipient replies in such a

manner, the Director of the Foreign Assets Control Office then makes a final determination as to whether a violation has occurred and, if so, what financial penalty should be imposed. Such final determination is set forth in a Penalty Notice. 31 C.F.R. § 575.704.

B. *Karpova Travels to Iraq*

In early 2003 the Project hoped to bring attention to the fact that the United States allegedly had bombed civilian infrastructure in Iraq during the 1990 Gulf War. The method the Project chose to get public attention was to send non-Iraqis to these sites to act as human shields. The presence of civilians at the sites, it was hoped, would publicize the threat to them were the United States to begin a bombing campaign, and perhaps deter the United States from acting. Plaintiff Karpova joined this group and sent a letter to supporters indicating her plans to travel to Iraq in February 2003 as a member of the Project. She requested supporters to send small donations to help finance her travel expenses. On February 19, 2003 she arrived in Iraq and remained there until March 9. Karpova did not obtain a license that might have authorized her, despite the economic sanctions, to engage in travel-related transactions involving Iraq. While there, plaintiff acted as a preemptive human shield. Although Karpova left the country before the United States' bombing campaign actually began, appellant was near an oil refinery while in Iraq. Karpova also went on guided tours in Basra

and Baghdad, visited hospitals and schools, and spent time "looking, listening, talking, and writing." Her writing took the form of four letters sent back to America that were printed in installments by the Jersey Journal. The Foreign Assets Control Office learned of Karpova's unauthorized trip from press accounts.

C. *Agency's Response*

On March 20, 2003 the Foreign Assets Control Office sent a letter to plaintiff requiring that she provide the Department of the Treasury with a detailed written report concerning her trip to Iraq, so that it could ascertain whether she had violated the Iraqi Sanctions Regulations. This "Requirement to Furnish Information" specifically required Karpova to provide the dates of her travel to Iraq, reason for her trip, and a detailed itemization of all travel-related transactions in which she engaged in connection with her trip. Plaintiff responded on April 21, 2003 with a lengthy letter, which included the dates and various reasons for her trip, but failed to provide a detailed itemization of all travel-related transactions. Instead, she simply asserted that all of her travel-related transactions were taken care of by an organization called the Peace, Friendship, and Solidarity Organization, and thus that she was not required to spend any money during her 19 days in Iraq.

Plaintiff did not provide any proof to support her statements despite the Agency's request that she provide a copy of any travel-related receipts or records associated with her expenditures in Iraq. The Agency replied on June 23, 2004 by sending Karpova a Prepenalty Notice stating she had violated the Iraqi Sanctions Regulations by exporting her services to Iraq and engaging in unauthorized travel-related transactions while there. The Prepenalty Notice cited the following specific violations: (1) attempting to collect funds for travel expenses to/from/within Iraq, (2) departing Jordan for Iraq and arriving in Iraq, (3) providing ministerial services, (4) serving as a freelance journalist, (5) providing services to the government of Iraq by shielding Iraqi government infrastructure from possible United States military action, and (6) engaging in travel-related transactions, including the purchase of food. The Prepenalty Notice proposed a penalty of $10,000, and it gave Karpova an opportunity to submit a written response. The Prepenalty Notice requested that Karpova explain why the penalty should not be issued or why, if issued, it should be reduced.

Karpova answered this request on August 5, 2004 with a letter from her lawyer arguing that she had not provided services to any agency of the Iraqi government. The letter contended that the regulatory scheme under the Iraqi Sanctions Regulations violated Karpova's due process rights and exceeded the authority of the Executive branch, and that the penalty violated Karpova's First and

Fifth Amendment rights. She did not dispute that she had engaged in transactions related to travel in Iraq, but she incorporated by reference her previous letter as something for the Foreign Assets Control Office to consider in determining the appropriate penalty.

On March 14, 2005 the Agency sent Karpova a Penalty Notice. The Penalty Notice ruled that she had violated the Iraqi Sanctions Regulations by engaging in prohibited transactions relating to Iraq, as detailed in the Prepenalty Notice. It explained that Karpova's response had not presented any new facts or explanations to refute the Foreign Assets Control Office's charges that Karpova violated the regulations. The fine was reduced from $10,000 to $6,700 in light of the fact that plaintiff had provided a written response to the Prepenalty Notice and because it was her first offense.

D. *The Instant Suit*

On June 9, 2005 plaintiff brought the instant suit alleging that the fine imposed against her for her travel to Iraq was arbitrary and capricious in violation of the Administrative Procedure Act and unconstitutional under the First and Fifth Amendments. She also claimed the Iraqi Sanctions Regulations were themselves unlawful. Karpova requested the district court declare the Penalty Notice and 31 C.F.R. § 575.207 (prohibited transactions relating to Iraq) null and void and

sought a permanent injunction preventing the United States from blocking or restricting her First and Fifth Amendment rights. On October 25, 2005 the district court granted summary judgment in favor of the government and dismissed Karpova's complaint in its entirety. This appeal followed.

DISCUSSION

I Administrative Procedure Act Claims

On appeal from a grant of summary judgment involving a claim brought under the Administrative Procedure Act, we review the administrative record *de novo* without according deference to the decision of the district court. *Supreme Oil Co. v. Metro. Transp. Auth.*, 157 F.3d 148, 151 (2d Cir. 1998) (per curiam). Under 5 U.S.C. § 706(2)(A) a reviewing court must hold unlawful and set aside any agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. However, "[t]he scope of review under the 'arbitrary and capricious' standard is narrow," and courts should not substitute their judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Instead, an agency determination will only be overturned when the agency

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its

> decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. In other words, so long as the agency examines the relevant data and has set out a satisfactory explanation including a rational connection between the facts found and the choice made, a reviewing court will uphold the agency action, even a decision that is not perfectly clear, provided the agency's path to its conclusion may reasonably be discerned. *Id.*

The Penalty Notice was far from clear. It did not explicitly set forth the basis for its determination that Karpova violated the Iraqi Sanctions Regulations. Instead, it referenced the fact that the Prepenalty Notice had accused her of engaging in certain prohibited transactions relating to Iraq and found that such transactions violated the regulations. The Prepenalty Notice had listed a number of different violations of the regulations assertedly committed by Karpova and accused appellant of "exportation of services to Iraq" in violation of 31 C.F.R.§ 575.205 and of "unauthorized travel-related transactions in Iraq" in violation of 31 C.F.R. § 575.207.

Specifically, the Prepenalty Notice had accused her of the six acts outlined a moment ago and had cited the applicable regulations. But strikingly, in the first paragraph of the Penalty Notice, where the charge against Karpova and the

Agency's ruling are listed, there is no mention of plaintiff providing services to Iraq. Instead, the Penalty Notice just cited the accusation that Karpova had engaged in the transactions detailed in the Prepenalty Notice and ruled that "such transactions violated the Iraqi Sanctions Regulations" (emphasis added). As a consequence, in determining whether the regulations were applied in an arbitrary and capricious manner, we look at whether the transactions listed in the Prepenalty Notice were sufficient to support the Agency's determination that Karpova violated § 575.207 by "engag[ing] in any transaction relating to travel by any U.S. citizen . . . to Iraq.

"We turn first to the specific allegations against appellant. The three transactions Karpova was accused of were: (1) attempting to collect funds for travel expenses to/from/within Iraq, (2) departing Jordan for Iraq and arriving in Iraq, and (6) purchasing food while in Iraq. It was not arbitrary and capricious for the Foreign Assets Control Office to determine that Karpova had engaged in these three transactions. Karpova's letter indicated that she solicited small donations to help finance her travel expenses to Iraq. The regulations do not define the term "transaction," but it was not unreasonable for the Agency to decide that solicitation of funds constitutes a transaction. Appellant admitted in addition in her letter replying to the Prepenalty Notice that she traveled to Iraq during the winter of 2003. Insofar as the purchase of food in Iraq is concerned, appellant conceded in an

article she submitted to the Jersey Journal that although she was not paying for living expenses during her first week in Iraq, she expected her group would start paying its way once they got organized. Plaintiff subsequently maintained she was not required to spend any money in Iraq, but she did not adduce any proof to support that assertion despite the demand that she provide a detailed itemization of all travel-related transactions backed by pertinent records. Given the foregoing, it was not arbitrary and capricious for the Agency to rule Karpova had engaged in transactions relating to travel in Iraq in violation of the regulations. Thus, the Agency's action may not be faulted under the Administrative Procedure Act.

We note next that the Penalty Notice also mentioned that appellant had provided a service to the government of Iraq by shielding the oil refinery from possible United States military action. This indicates that perhaps Karpova was fined not only for the transactions she engaged in, but also for the services she provided. Further, the Prepenalty Notice could be read to imply that Karpova was punished for engaging in another type of service as well -- serving as a freelance journalist. If so, then the Agency's determination was flawed. There is no indication in the record that she sought to render this service to the Iraqi government, and so the Agency would have acted arbitrarily and capriciously had it punished her for this activity. However, we need not determine the exact contours of the conduct for which appellant was fined, since the Foreign

Assets Control Office could have fined her $6,700 for committing any one of the six alleged acts. See 31 C.F.R. § 575.701. Thus, it is unnecessary to consider whether the services provided by appellant to Iraq could have served as an alternative basis for this penalty.

Even if we were to conclude the Agency alternatively based the fine on one or more of the alleged services provided by Karpova, and find such alternative grounds were flawed, remand is not required here. We are confident that the Agency would reach the same conclusion absent any such error. *See, e.g., NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (not requiring remand where it serves as an "idle and useless formality"); *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982) (stating that remand is required "only where there is a significant chance that but for the error, the agency might have reached a different result").

Similarly, even if plaintiff is correct that some of the transactions she engaged in in Iraq related to journalistic activities and thus were exempted from sanction by § 575.207, remand on that basis would be futile. By way of background, § 575.207 provides that transactions "[r]elating to journalistic activity by persons regularly employed in such capacity by a newsgathering organization" are not sanctionable, and§ 575.416(b)(1) clarifies that certain freelance journalists are covered by § 575.207's exemption. Karpova's argument is that her solicitation of funds, her travel to Iraq, and her purchase of food all

related to her freelance journalistic activity, and thus were not sanctionable under the regulations. Unfortunately, the Agency did not provide much explanation on this issue; it merely noted in the Prepenalty Notice that Karpova acted as a freelance journalist while in Iraq, but failed to address in its final decision whether she qualified as a journalist under § 575.416 and whether these transactions were covered by this exception. Yet, plaintiff overlooks § 575.416(c), which notes that "[a]uthorized travel transactions are limited to those incident to travel for the purpose of collecting and disseminating information for a recognized newsgathering organization, and *do not include travel transactions related to any other activity in Iraq*" (emphasis added). Karpova admits that among her activities within Iraq were excursions to "defend Iraqi civilian infrastructure from bombing." Such activity clearly would not fall within the journalistic exception, and thus we are confident the Agency would reach the same conclusion even were we to determine that some of Karpova's activities in Iraq were exempted by the journalistic exception.

Appellant finally declares that the regulations themselves exceeded the authority Congress gave to the President to limit economic contact with Iraq. This argument may be swiftly rejected. The regulations were promulgated to implement executive orders which were issued under the authority granted to the President by both the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.* and the United Nations

Participation Act (UNPA), 22 U.S.C. § 287 *et seq*. *See* Exec. Order No. 12,722, 55 Fed. Reg. 31,803 (Aug. 2, 1990); Exec. Order No. 12,724, 55 Fed. Reg. 33,089 (Aug. 9, 1990); *see also Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 775-77 (9th Cir.2006); *Office of Foreign Assets Control v. Voices in Wilderness*, 329 F. Supp. 2d 71, 78 (D.D.C. 2004) (finding authority solely under the UNPA). In addition, the Iraqi Sanctions Act of 1990 directed the President to "continue to impose the trade embargo and other economic sanctions with respect to Iraq and Kuwait that the United States is imposing . . . pursuant to Executive Order [ ] Numbered 12724 . . . , and, to the extent [it is] still in effect, Executive Order[] Numbered 12722 . . . ." Pub. L. No.101-513, § 586C(a), 104 Stat. 1979, 2048 (1990). To the extent that appellant asserts that there was not a "legal predicate for imposition and extension of the economic sanctions" because there had been no finding that the Iraqi regime posed "an urgent threat to the security of the United States in 2003[ ]," we note that in deciding to impose sanctions the President was acting in the area of foreign policy pursuant to congressional authorization. We review with great deference such executive branch determinations. *Palestine Info. Office v. Schultz*, 853 F.2d 932, 937 (D.C. Cir.1988). We decline to second-guess the President's determination that the Iraqi regime posed an urgent threat to the United States such that he could punish those who violated the economic and travel restrictions pursuant to the regulations. The district court's dismissal of

plaintiff's challenge to the authority for the regulations should be affirmed.

II Procedural Due Process Claim

The district court granted the government summary judgment with respect to Karpova's due process claim. We review that grant de novo, construing the facts in the light most favorable to Karpova. *See Tocker v. Philip Morris Cos.*, 470 F.3d 481, 486 (2d Cir. 2006). Summary judgment is only appropriate when there is no genuine issue as to any material fact, making judgment appropriate as a matter of law. *Id.* at 486-87.

A. *Opportunity to be Heard*

Under the Fifth Amendment's Due Process Clause no person maybe deprived of life, liberty, or property without reasonable notice and an opportunity to be heard. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The opportunity to be heard must be "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333(1976). However, the Due Process Clause does not necessarily require that a person be given an opportunity to be heard orally in a testimonial setting; the opportunity for written submissions may be sufficient. *See Interboro Inst., Inc. v. Foley*, 985 F.2d90, 93 (2d Cir. 1993). The liberty interest and legal issues involved determine the kind of hearing

necessary. *Id.* Therefore, in this context so long as those that are to decide have before them claimant's legal arguments and do not act on a one-sided or incomplete record, the Due Process Clause is satisfied. Id.

There is no dispute that appellant was given notice before she was fined. The key question is whether the opportunity she was given to be heard was sufficient. The Agency's procedural safeguards guaranteed that prior to fining Karpova, the Foreign Assets Control Office informed her of its tentative assessment, explained to her the basis for that assessment, provided her with a summary of the evidence it considered relevant, and offered her an opportunity to respond in a written presentation. *See, e.g., Mathews*, 424 U.S. at 346. The Agency considered the legal arguments in Karpova's written submissions and issued a ruling against her. Appellant has not identified in what way a testimonial hearing would have benefitted her. Thus, there is no genuine issue of material fact with regard to whether adequate notice and an opportunity to be heard were provided to plaintiff.

B. *Did the Foreign Assets Control Office Act as Both Prosecutor and Judge?*

We had a concern arising from appellant's arguments that due process may have been violated in this case because the same titled officer served as both prosecutor and judge in the administrative proceedings. The Supreme Court has explained that

the combination of investigative and adjudicative functions in the same individual does not necessarily create an unconstitutional risk of bias so as to imperil the Due Process Clause's requirement that trials be held before fair tribunals. *See Withrow v. Larkin*, 421 U.S. 35, 46, 47, 57-58 (1975).Instead, courts make case by case judgments based on the special facts and circumstances of each particular situation in determining whether the risk of unfairness is intolerably high. *Id.* at 58. However, we have recognized that it presents a troublesome question to determine when a single individual could serve as both prosecutor and judge in the same case without violating due process. *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 618(2d Cir. 2004). But here, when it is the same office – rather than the same person — that performs multiple functions, due process is not violated. *Id.* at 618-19.

Here, the Director of the Office of Foreign Assets Control performed a prosecutorial function by sending Karpova the June 23, 2004 Prepenalty Notice that first notified plaintiff of the specific charges against her. The Director of the same office made the Agency's final ruling against Karpova in the March 14, 2005 Penalty Notice. However, the Director on June 23, 2004 was R. Richard Newcomb, while the Director on March 14, 2005 was Robert W. Werner. Since the same individual did not perform adjudicative and non-adjudicative functions, there is no risk of bias in the case at hand and thus no due process violation.

III Right to Travel and Free Speech Claims

A. *Standard of Review*

The trial court dismissed Karpova's First Amendment free speech and Fifth Amendment right to travel claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state claims. We review *de novo* a district court's decision to dismiss a complaint pursuant to Rule 12(b)(6), accepting as true all factual allegations contained in the complaint and drawing all inferences in plaintiff's favor. *Global Network Comme'ns, Inc. v. City of New York*, 458 F.3d 150, 154 (2d Cir. 2006).

B. *Right to Travel Claim*

Although the constitutional right to travel within the United States is virtually unqualified, the right to travel internationally is simply an aspect of the liberty protected by the Due Process Clause of the Fifth Amendment, and as such may be regulated within the bounds of due process. *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (per curiam). Therefore, this liberty interest does not itself overcome the weighty foreign policy concerns that may support travel restrictions. *See Regan v. Wald*, 468 U.S. 222, 242 (1984). The President, in an executive order implementing the economic sanctions authorized by Congress in the Iraqi Sanctions Act of 1990, declared that the "policies and actions of the Government of Iraq constitute an unusual and extraordinary threat to the national security and foreign policy of the

United States," and therefore ordered that transactions by United States citizens relating to travel to Iraq be prohibited. Exec. Order No. 12,722, 55 Fed. Reg. 31,803 (Aug. 2, 1990). Since the restriction on engaging in such transactions was based on these concerns of foreign policy, the travel restriction was not a violation of Karpova's liberty interests under the Fifth Amendment's Due Process Clause.

C. *Free Speech Claim*

Under the First Amendment, a restriction against traveling to a specified country is "an inhibition of action," not speech. *Zemel v. Rusk*, 381 U.S. 1, 16 (1965). As the *Zemel* Court explained, many restrictions on action could "be clothed by ingenious argument in the garb of decreased data flow." *Id.* At 16-17. Yet such arguments are to no avail since the First Amendment guarantees a citizen the right to speak and publish, but does not guarantee an unrestrained right to gather information. *Id.* at 17. Karpova was fined because of her actions in violating the travel regulations, not for her speech. Consequently, her First Amendment rights were not violated.

CONCLUSION

Accordingly, for the foregoing reasons, the grant of summary judgment by the district court dismissing Karpova's complaint is affirmed.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF THE COURT

Date:	DC Docket Number: 05-cv-5812
Docket Number: 06-0104-cv	DC: SDNY (WHITE PLAINS)
Short Title: Karpova v. Snow	DC Judge: Honorable Colleen McMahon

Seal: United States Court of Appeals
Filed Oct 22 2007
Catherine O'Hagan Wolfe, Clerk
Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 5 Pearl Street, in the City of New York, on the 22nd day of October, two thousand seven.

Karpova v. Snow

A petition for panel rehearing and a petition for rehearing en banc have been filed herein by the

appellant Judith Karpova. Upon consideration by the panel that decided the apeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no judge has requested that a vote be taken thereon.

For the Court:
Catherine O'Hagen Wolfe, Clerk

By: (s/ Joy Falleh)
Motion Staff Attorney